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**RESPONSE UNDER 37 C.F.R. § 1.116
EXPEDITED PROCEDURE REQUESTED
EXAMINING GROUP 3732
PATENT**

Customer No. 22,852
Attorney Docket No. 05725.0869-02

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:

Jean-Louis H. GUERET

Application No.: 09/809,268

Filed: March 16, 2001

For: PRODUCT APPLICATOR AND
PACKAGING UNIT COMPRISING
SUCH APPLICATOR

)
)
) Group Art Unit: 3732

)
) Examiner: Eduardo C. ROBERTY
)
)

1-A
7-2903

#13/Petition
under
37 CFR
1.144

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TECHNOLOGY CENTER #3700

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Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

**PETITION TO GROUP DIRECTOR OF TECHNOLOGY CENTER 3730
UNDER 37 C.F.R. § 1.144 REQUESTING RECONSIDERATION AND REVERSAL
OF THE EXAMINER'S WITHDRAWAL OF CLAIMS PURSUANT TO
AN ELECTION OF SPECIES REQUIREMENT**

For the reasons explained below, Applicant hereby petitions that the Group Director reconsider and reverse the Examiner's final decision to withdraw claims 23-34, 36-39, 41-62, 64-69, 71, 72, 82-108, 110-115, 117, 118, 128-135, 138-145, 147, 153, 154, 157-160, 164, 176-178, 180-188, 191-203, 205, and 214-222 from consideration pursuant to an Election of Species Requirement and Applicant's subsequent Response to the Election of Species Requirement. Applicant is filing herewith a check in the amount of \$130.00 to cover the fee payment under 37 C.F.R. § 1.17(h).

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The Examiner issued an Election of Species Requirement on July 8, 2002, requiring an election under 35 U.S.C. § 121 between asserted species shown in FIGS. 1-8. In a Response to Election of Species Requirement filed on August 7, 2002, Applicant elected to prosecute the species corresponding to FIG. 4, and designated claims 23-34, 36-39, 41-62, 64-69, 71, 72, 82-108, 110-115, 117, 118, 128-154, 156-161, 163, 164, 174-203, 205, and 214-222 as being directed to the elected species.¹

In an Office Action dated October 22, 2002, the Examiner made the election of species "final" and withdrew claims 23-34, 36-39, 41-62, 64-69, 71, 72, 82-108, 110-115, 117, 118, 128-135, 138-14, 147, 153, 154, 157-160, 164, 176-178, 180-188, 191-203, 205, and 214-222 from consideration as being drawn to a nonelected species, despite Applicant's previous designation of those claims as being "readable" on the elected species.² As explained in the following discussion, Applicant submits that the Examiner's decision to withdraw those claims should be reversed because each of those claims is "readable" on the elected species of FIG. 4.

¹ Although Applicant initially designated the election of the species of FIG. 4 "without traverse," Applicant did not appreciate that the Examiner would be withdrawing a substantial number of the initially-designated claims. Accordingly, as noted in the Office Action dated April 23, 2003, the election was subsequently converted into an election "with traverse" capable of being reviewed according to the present petition.

² Applicant has made several attempts to conduct an interview with the Examiner to discuss various issues in the present application, including the improper withdrawal of the claims, but the Examiner has failed to respond to those requests, except in one recent instance where the Examiner expressed a refusal to conduct any form of interview for the present application. For example, the Preliminary Amendment filed May 16, 2002, at page 41, included a specific request for an interview, but the Examiner did not even acknowledge that request. Furthermore, the undersigned has left numerous voicemail messages for the Examiner concerning requests to schedule an interview, but none of these calls was returned. Finally, after numerous attempts, the undersigned spoke with the Examiner in a telephone conversation on May 15, 2003, and the Examiner informed the undersigned that he would "never" grant a personal interview in connection with this application or any other application filed by the assignee of the present application.

Regarding independent claim 23, the Examiner appears to allege that the claim recitation of "a flexible elongated gripping portion comprising a second end of [a] flexible support and at least one layer of a flexible material covering the second end ..., said flexible material being impervious to the cosmetic product" does not read on the elected species of FIG. 4. Office Action dated October 22, 2002 ("Office Action"), page 1. Applicant respectfully disagrees and submits that this exemplary feature is generic to each of the exemplary embodiments shown in FIGS. 1-8.

The Examiner alleges that "the only material being described as impervious is material 16b," which does not cover the gripping portion. Id. Indeed, the specification discloses "a foam layer 16b with closed cells that is impervious to this product," in connection with FIG. 7. Page 10, lines 14-16. In addition to that disclosure, however, the Summary of the Invention section of the specification, which applies to all of the embodiments shown in the drawings, indicates that "the first and/or second spongy material fixed to one side of the applicator may be a leakproof foam with closed cells." Page 3, lines 22-24. Further, the specification notes that "[t]his material makes it possible to obtain an applicator having one side impervious to the product." Page 3, lines 24-26. The specification also mentions that "the applicator may have on the same side one or several layers [e.g., third and fourth layers 16c, 16d] of a spongy material that are identical or different, both as regards the gripping portion and the applicator portion." Page 5, lines 3-6.

With specific reference to FIG. 4, the specification does not exclude any of the first, second, third, and fourth layers 16a, 16b, 16c, 16c of soft spongy material from being a leakproof foam with closed cells. Therefore, consistent with the general

disclosure that any of the layers may be a leakproof foam impervious to a cosmetic product, Applicant submits that one of ordinary skill in the art would consider the specification as disclosing the third layer 16c and/or the fourth layer 16d, which cover the second end (i.e., gripping portion 4), may be a flexible material impervious to the cosmetic product. Accordingly, Applicant submits that claim 23 reads on the elected species of FIG. 4.

Regarding independent claim 24, the Examiner alleges that "Figure 4 is not disclosed or shown as having a cardboard flexible support." Office Action, page 1. Applicant respectfully disagrees and submits that this exemplary feature pertains to all of the species shown in the drawings. In generally describing all of the embodiments shown in the drawings, the specification mentions that the applicator may include a support "made of cardboard, plastic, leather, or of a foam that is more rigid than the first and second spongy materials." Page 4, lines 10-12. With respect to FIG. 1, the specification discloses "a semi-rigid strip-shaped support 2," which "may be made of cardboard." Page 7, lines 15-16 (emphasis supplied). The specification further discloses that the exemplary embodiment of FIG. 4 includes the support 2, and then describes how this embodiment differs from that shown in FIG. 1. Page 8, lines 27-28 (emphasis supplied). The specification does not distinguish the support 2 of FIG. 4 from the support 2 of FIG. 1. Therefore, Applicant respectfully submits that one of ordinary skill in the art would consider the specification as disclosing that the support 2 of FIG. 4 may be made of cardboard, and, therefore, claim 24 reads on the elected species of FIG. 4.

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Regarding independent claim 29, the Examiner alleges that the species corresponding to FIG. 4 is not specifically disclosed as having "a gripping portion comprising a second end of the support and at least one layer of a flexible material covering the second end and the material being impervious to a product to be applied." Office Action, page 2. Applicant disagrees and submits that claim 29 reads on the elected species of FIG. 4 for reasons similar to those set forth above in connection with claim 23.

Regarding independent claims 33, 34, and 39, the Examiner alleges that the species corresponding to FIG. 4 is not specifically disclosed as having "at least one application portion and a gripping portion being asymmetrical with respect to one another." Office Action, page 2. Applicant respectfully disagrees and submits that this exemplary feature is generic to at least the species corresponding to FIGS. 2-6. FIG. 2 illustrates an applicator 1 having a thin portion (i.e., gripping portion 6) and a circular-shaped wide portion (i.e., application portion 4) asymmetrical with respect to one another. See page 4, lines 15-20. Further, the specification describes how the exemplary embodiment of FIG. 4 differs from that of FIG. 2, but makes no mention of a differing shape of the applicator of FIG. 4. Page 8, lines 27-28. Therefore, one of ordinary skill in the art would consider the specification as disclosing that the applicator of FIG. 4 may have a shape similar to the applicator of FIG. 2. Accordingly, Applicant submits that claims 33, 34, and 39 read on the elected species of FIG. 4.

Regarding independent claims 43 and 90, the Examiner alleges that the species corresponding to FIG. 4 is not specifically disclosed as having "a gripping portion having a visual difference from the applicator portion." Office Action, page 2. Applicant

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respectfully disagrees and submits that this exemplary feature is generic to at least the species corresponding to FIGS. 1-6. Particularly, the thin gripping portion 6 and the circular-shaped wide application portion 6, as shown in FIG. 2, are visually different from one another. As discussed above in connection with claims 33, 34, and 39, the specification discloses that the applicator of FIG. 4 may have a shape like that shown in FIG. 2. Therefore, one of ordinary skill in the art would consider the specification as disclosing that the applicator of FIG. 4 includes a gripping portion and an application portion that are visually different from one another. Accordingly, Applicant submits that claims 43 and 90 read on the elected species of FIG. 4.

Regarding independent claim 191, the Examiner alleges that the species corresponding to FIG. 4 is not specifically disclosed as having "a flexible support with a first end which is a flexible handle." Office Action, page 3. The Examiner further alleges that this feature appears to be new matter. Applicant respectfully disagrees and submits that this exemplary feature is generic to at least the species corresponding to FIGS. 1-6. As discussed in the Request for Reconsideration filed on January 22, 2003, the term "handle" is known to be "a part that is designed to be held or operated with the hand." American Heritage College Dictionary, 3d ed., 1997. As shown in FIG. 2, the thin gripping portion is designed to be held with the hand and, as discussed above, the specification discloses that the applicator of FIG. 4 may have a shape like that shown in FIG. 2. Page 8, lines 27-28. Thus, one of ordinary skill in the art would consider the specification as disclosing that the applicator of FIG. 4 includes "a flexible handle comprising a first end of a flexible support," as recited in claim 191. Therefore, Applicant submits that claim 191 reads on the elected species of FIG. 4.

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Regarding claim 26, the Examiner alleges that the species corresponding to FIG. 4 is not specifically disclosed as having "foam as the flexible material." Office Action, page 1. Applicant respectfully disagrees and submits that this exemplary feature is disclosed as being present on any of the species shown in the drawings. For example, Summary of the Invention portion of the specification recites that the application portion and the gripping portion may comprise a layer of material such as a foam. Page 3, lines 8-21. Further, the specification particularly recites foam layers in connection with FIGS. 1 and 2. Page 7, lines 20-22; page 8, lines 13-14. Therefore, Applicant respectfully submits that one of ordinary skill in the art would consider the specification as disclosing that the layers of material at the application portion and gripping portion of the applicator support 2 of FIG. 4 may be a foam, and that claim 26 reads on the elected species of FIG. 4.

Regarding claim 138, the Examiner alleges that the species corresponding to FIG. 4 is not specifically disclosed as having "a flexible support comprising cardboard, plastic, leather, and foam." Office Action, page 2. Applicant respectfully disagrees and submits that this exemplary feature is disclosed as being a possibility for any of the species shown in the drawings. As discussed above, the specification generally recites that the applicator may include a support "made of cardboard, plastic, leather, or of a foam that is more rigid than the first and second spongy materials." Page 4, lines 1-12. Therefore, Applicant respectfully submits that one of ordinary skill in the art would consider the specification as disclosing that the support of the applicator of FIG. 4 may be made of cardboard, plastic, leather, or foam, and, thus, claim 138 reads on the elected species of FIG. 4.

Regarding claim 139, the Examiner alleges that the species corresponding to FIG. 4 is not specifically disclosed as having "a flexible support comprising a material of cardboard and leather." Office Action, page 2. Applicant respectfully disagrees and submits that the specification discloses that this exemplary feature could be present on any of the species shown in the drawings. For reasons similar to those discussed above in connection with claim 138, Applicant submits that one of ordinary skill in the art would consider the specification as disclosing that the support of the applicator of FIG. 4 may be made of cardboard or leather, and, thus, claim 139 reads on the elected species of FIG. 4.

Regarding claim 140, the Examiner alleges that the species corresponding to FIG. 4 is not specifically disclosed as having "an application portion comprising one of a tuft of bristles, a pencil brush, a feather, a foam material, a sponge material and a baize material." Office Action, page 2. Applicant respectfully disagrees and submits that the specification discloses that such an exemplary feature could be present on any of the embodiments shown in the drawings. In the Summary of the Invention section, the specification discloses that "[t]he applicator portion of the applicator may be a tuft of bristles, a pencil brush, a feather (quill) or even a foam, a sponge or a baize material. Page 3, lines 8-10. Therefore, Applicant respectfully submits that one of ordinary skill in the art would consider the specification as disclosing that the layers of material at the application portion of the applicator of FIG. 4 may comprise one of be a tuft of bristles, a pencil brush, a feather, a foam material, a sponge material and a baize material, and, therefore, claim 140 reads on the elected species of FIG. 4.

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Regarding claim 141, the Examiner alleges that the species corresponding to FIG. 4 is not specifically disclosed as having "a first spongy flexible material comprising a closed-cell foam." Office Action, page 2. Applicant respectfully disagrees and submits that the specification discloses this exemplary feature as being a possibility for any of the embodiments shown in the drawings. As discussed above, the specification generally discloses that the first and/or second spongy material may be a leakproof foam with closed cells, which may be impervious to a product. Page 3, lines 22-26. Therefore, Applicant respectfully submits that one of ordinary skill in the art would consider the specification as disclosing that the first spongy flexible material of the applicator of FIG. 4 may comprise a closed-cell foam impervious to the cosmetic product, and, thus, claim 141 reads on the elected species of FIG. 4.

Regarding claim 142, the Examiner alleges that the species corresponding to FIG. 4 is not specifically disclosed as having "a first spongy flexible material chosen from polyurethane, polyester, polyether, polyvinyl chloride, and polyethylene." Office Action, page 2. Applicant respectfully disagrees and submits that the specification discloses this exemplary feature as being a possibility for any of the embodiments shown in the drawings. The Summary of the Invention section of the specification mentions that the first and/or second spongy material may be "formed of a material chosen from foams of polyurethane, polyester, polyether, polyvinyl chloride, and polyethylene." Page 3, lines 19-21. Therefore, Applicant respectfully submits that one of ordinary skill in the art would consider the specification as disclosing that the first spongy flexible material of the applicator of FIG. 4 may be chosen from polyurethane,

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polyester, polyether, polyvinyl chloride, and polyethylene, and, thus, claim 142 reads on the elected species of FIG. 4.

Regarding claim 143, the Examiner alleges that the species corresponding to FIG. 4 is not specifically disclosed as having "a first spongy flexible material comprising one of flocking, a fabric layer covering, and a silicone layer covering." Office Action, page 2. Applicant respectfully disagrees and submits that the specification discloses that such an exemplary feature could be present on any of the species shown in the drawings. In the Summary of the Invention section, the specification discloses that "at least one of the spongy materials may be flocked or covered with a fabric of a silicone layer." Page 3, lines 26-27. Therefore, Applicant respectfully submits that one of ordinary skill in the art would consider the specification as disclosing that the first spongy flexible material of the applicator of FIG. 4 may comprise flocking, a fabric layer covering, or a silicone layer covering, and, therefore, claim 143 reads on the elected species of FIG. 4.

Regarding claim 144, the Examiner alleges that the species corresponding to FIG. 4 is not specifically disclosed as having "a first spongy flexible material impregnated with at least one active cosmetic agent." Office Action, page 2. Applicant respectfully disagrees and submits that this exemplary feature is disclosed as being a possibility for any of the species shown in the drawings. The Summary of the Invention section of the specification mentions that "the spongy materials may be impregnated with active cosmetic agents." Page 4, lines 1-2. Therefore, Applicant respectfully submits that one of ordinary skill in the art would consider the specification as disclosing that the first spongy flexible material of the applicator of FIG. 4 may comprise flocking, a

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fabric layer covering, or a silicone layer covering, and, thus, claim 144 reads on the elected species of FIG. 4.

Regarding claim 147, the Examiner alleges that the species corresponding to FIG. 4 is not specifically disclosed as having "a first spongy flexible material identical to a second spongy flexible material." Office Action, page 2. Applicant respectfully disagrees and submits that this exemplary feature is disclosed as a possibility for any of the species shown in the drawings. In the Summary of the Invention section, the specification recites that "the first and second materials may be identical or different." Page 3, lines 15-16. Therefore, Applicant respectfully submits that one of ordinary skill in the art would consider the specification as disclosing that the first spongy flexible material of the applicator of FIG. 4 may be identical to the second spongy flexible material, and, therefore, claim 147 reads on the elected species of FIG. 4.

Regarding claim 153, the Examiner alleges that the species corresponding to FIG. 4 is not specifically disclosed as having "at least two of the layers of a same material." Office Action, page 2. Applicant respectfully disagrees and submits that this exemplary feature pertains to all of the embodiments shown in the drawings. For reasons similar to those discussed above in connection with claims 23 and 147, Applicant submits that one of ordinary skill in the art would consider the specification as disclosing that the applicator of FIG. 4 may include at least two spongy layers comprising a same material, and, thus, claim 153 reads on the elected species of FIG. 4.

Regarding claim 154, the Examiner alleges that the species corresponding to FIG. 4 is not specifically disclosed as having "a flexible support having a material

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chosen from cardboard and leather.” Office Action, page 2. Applicant respectfully disagrees and submits that this exemplary feature pertains to all of the species shown in the drawings. For reasons similar to those discussed above in connection with claims 138 and 139, Applicant submits that one of ordinary skill in the art would consider the specification as disclosing that the flexible support of the applicator of FIG. 4 may comprise a cardboard or leather material, and, therefore, claim 154 reads on the elected species of FIG. 4.

Regarding claims 157, 158, and 160, the Examiner alleges that the species corresponding to FIG. 4 is not specifically as having differently configured and/or asymmetrical application and gripping portions. Office Action, pages 2-3. Applicant respectfully disagrees and submits that such an exemplary feature could be present on the embodiments shown in FIGS. 1-6. For reasons similar to those discussed above in connection with claims 33, 34, 39, 43, and 90, Applicant submits that one of ordinary skill in the art would consider the specification as disclosing that the applicator of FIG. 4 may include differently sized, differently shaped, and/or asymmetrical application and gripping portions or portion having different widths, and, therefore, claims 157, 158, and 160 read on the elected species of FIG. 4.

Regarding claim 164, the Examiner alleges that the species corresponding to FIG. 4 is not specifically disclosed as having “a flexible support that is spoon-shaped.” Office Action, page 3. Applicant respectfully disagrees and submits that this exemplary feature pertains to the species corresponding to FIGS. 2-4. For example, FIG. 2 illustrates a spoon-shaped flexible support 2. As discussed above, the specification further discloses that the exemplary embodiment of FIG. 4 includes the support 2, and

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then describes how this embodiment differs from that shown in FIG. 2. Page 8, lines 27-28. The specification does not distinguish the shape of the support 2 of FIG. 4 from that of FIG. 2. Therefore, Applicant respectfully submits that one of ordinary skill in the art would consider the specification as disclosing that the support 2 of FIG. 4 may be spoon-shaped, and, thus, claim 164 reads on the elected species of FIG. 4.

Regarding claim 176, the Examiner alleges that the species corresponding to FIG. 4 is not specifically disclosed as having "cosmetic product impregnated on the application portion." Office Action, page 3. Applicant respectfully disagrees and submits that this exemplary feature pertains to all of the embodiments shown in the drawings. In the Summary of the Invention section, the specification discloses a method of applying a cosmetic product to a surface region that includes impregnating the application portion with a cosmetic product. Page 1, lines 16-18; page 8, lines 1-2. Therefore, Applicant respectfully submits that one of ordinary skill in the art would consider the specification as disclosing that the application portion of the applicator of FIG. 4 may be impregnated with a cosmetic product, and, thus, claim 176 reads on the elected species of FIG. 4.

Regarding claim 177, the Examiner alleges that the species corresponding to FIG. 4 is not specifically disclosed as having "a cosmetic product which is one of eye shadow, cheek blusher, make-up foundation, eyeliner, nail-care product, liquid lip rouge and loose powder." Office Action, page 3. Applicant respectfully disagrees and submits that this exemplary feature pertains to all of the species shown in the drawings. The Summary of the Invention section of the specification mentions that the applicator is intended "for the application of a make-up product such as eye shadow, cheek blusher,

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make-up foundation, eyeliner, a nail-care product, liquid lip rouge or loose powder.

Page 1, lines 7-10. Therefore, Applicant respectfully submits that one of ordinary skill in the art would consider the specification as disclosing that the application portion of the applicator of FIG. 4 may be impregnated with any of the aforementioned cosmetic products, and, therefore, claim 177 reads on the elected species of FIG. 4.

Regarding claim 178, the Examiner alleges that the species corresponding to FIG. 4 is not specifically disclosed as having "an eye makeup product and the surface region being an eyelid." Office Action, page 3. Applicant respectfully disagrees and submits that this exemplary feature pertains to all of the species shown in the drawings. In the Summary of the Invention section, and in connection with the species of FIG. 1, the specification discloses application of make-up product to the eyelid. Page 1, lines 16-20; page 8, lines 1-3. Therefore, Applicant respectfully submits that one of ordinary skill in the art would consider the specification as disclosing that the applicator of FIG. 4 may be used to apply an eye makeup product to an eyelid, and, thus, claim 178 reads on the elected species of FIG. 4.

Regarding claim 180, 181, and 184, the Examiner alleges that the species corresponding to FIG. 4 is not specifically disclosed as having "the step of deforming the layer of the first spongy flexible material with one of the finger and thumb during gripping" or "the step of flexing the flexible support during transferring," or being used in "a method of reducing pressure exerted on skin during use of an applicator to apply a cosmetic product." Office Action, page 3. Applicant respectfully disagrees and submits that these exemplary features pertain to all of the embodiments shown in the drawings. In the Summary of the Invention section, and in connection with the embodiment of FIG.

1, the specification recites the deformation of the support during gripping, the flexing of the support during application of product, and less aggressive (i.e., reduced pressure) application of product. Page 8, lines 1-10. Therefore, Applicant respectfully submits that one of ordinary skill in the art would consider the specification as disclosing that the applicator of FIG. 4 may provide the aforementioned deformation, flexing, and reduce pressure, and that claims 180, 181, and 184 read on the elected species of FIG. 4.

The Examiner also notes that claims 27, 28, 30-32, 36-38, 41, 42, 44-62, 64-69, 71, 72, 82-89, 91-108, 110-115, 117, 118, 128-135, 144, 145, 158, 159, 182, 183, 185-188, 192-203, 205, and 214-222 have been withdrawn from consideration as being dependent upon withdrawn claims. Office Action, page 3. Applicant submits that these claims read on the elected species of FIG. 4, and, as explained above, the claims from which they depend should not have been withdrawn.

In view of the foregoing, Applicant respectfully request rejoinder of claims 23-34, 36-39, 41-62, 64-69, 71, 72, 82-108, 110-115, 117, 118, 128-135, 138-145, 147, 153, 154, 157-160, 164, 176-178, 180-188, 191-203, 205, and 214-222 and prompt examination of those claims.

Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: July 23, 2003

By: 

Jay A. Stelacone
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